



Jonani v Agengo & 2 others (Environment and Land Civil Miscellaneous Application 72 of 2017) [2022] KEELC 15060 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15060 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CIVIL MISCELLANEOUS APPLICATION 72 OF 2017
A OMBWAYO, J
NOVEMBER 24, 2022
FORMERLY KISUMU HCC MISC.APP. NO. 140 OF 2013**

BETWEEN

JACOB EVANS JONANI PLAINTIFF

AND

JAIRO GUMBA AGENGO RESPONDENT

AND

JAIRO GUMBA AGENGO (BEING SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE PAULO AGENGO OTIENDE) 1ST DEFENDANT

PAUL OTIENO ONYANGO 2ND DEFENDANT

RULING

Brief Facts

1. Jacob Evans Jonani the Plaintiff herein filed this Notice of Motion Application dated November 12, 2019 under section 1A, 1B, 80 (a) of the *Civil Procedure Act* and Order 45 Rule 1 (a) of the *Civil Procedure Rules* seeking orders that:
 1. This Honourable Court be pleased to review its order dated May 30, 2018 dismissing the suit for want of prosecution.
 2. Upon its reinstatement this suit, be fixed for hearing on priority basis.
 3. The costs of this Application be provided for.
2. The Application was based on grounds that it is desirable to review the order dismissing the suit for want of prosecution in that the Applicant had shown cause against dismissal of the suit and counsel



for the Defendant/Respondent had passed on hence the suit could not be fixed for hearing until the Defendant /Respondent replaced their Advocate.

3. The Application was supported by the Affidavit of Jacob Evans Jonani who state that on May 29, 2018, the court served his Advocate on record with a notice under Order 17 Rule 2 of the Civil Procedure Rules seeking that the Advocate shows cause why the suit should not be dismissed for want of prosecution and his Advocate did show cause through his Affidavit sworn on May 28, 2018 and filed on May 29, 2018.
4. It was stated that despite showing cause, the court still went on to dismiss the suit and having perused the court file, he noticed that the court did not consider the Affidavit filed by his Advocate explaining that the Defendant's Advocate ailed for a very long time before succumbing which occasioned a delay to fix the matter for hearing. The Defendant on their part did not change their Advocate occasioning challenge on the part of the Plaintiff's Advocate to fix the suit for hearing.
5. It was further stated that the evidence of death was not in possession of the Plaintiff's Advocate at the time when the notice was served for hearing as time was limited to avail evidence of death. That had the court considered the reasons given by the Plaintiff's Advocate in the Affidavit, the court would have ordered otherwise.
6. The 3rd Defendant herein filed a Replying Affidavit in response to the Application where he stated that the suit was filed in 2013 and as at May 30, 2018 when the suit was dismissed for want of prosecution, the Applicant and /or his Advocate had not taken any steps to prosecute this suit.
7. That paragraph 5 and 6 of the Supporting Affidavit is not true as his previous Advocate on record the late Aloys Obunga Aboge died on 22nd July 2018 about two months after the suit had been dismissed for want of prosecution. It was stated that the Affidavit of the Counsel for the Applicant marked as JEJ "1" is presumptuous as there is nothing showing that the late Aloys Aboge and/or his firm was served with a mention or hearing notice but declined on account of his illness.
8. It is the 3rd Defendant's case that the late Mr. Aboge began ailing in 2018 and the firm was active since he had an associate who managed the firm and attended court. That the inordinate delay to prosecute this case by the Applicant has greatly prejudiced the Defence for reasons that the 1st Defendant/ Respondent who is key to this case died on November 14, 2016.
9. It was further stated that the Applicant's Advocate was served with the notice to show cause but the Applicant and his Advocate elected to attend court without any reason and if at all the Affidavit of Applicant's Advocate was filed and on record, then the court must have considered it while dismissing the suit. That the court having dismissed the suit for want of prosecution, the court becomes functus officio and that this Application is vexatious and an abuse of the process of court.
10. This Application came up for hearing on May 16, 2022 where Counsel for the Applicant stated that the Plaintiff is desirous with proceeding with the matter. Mr Ochuka Counsel for the Defendant opposed the Application and relied on the Affidavit sworn by the 3rd Defendant.

Analysis and determination

11. The legal framework on dismissal of suit for want of prosecution is found in Order 17 Rule 2 which provides as follows: -
 - "2. In any suit in which no application has been made or step taken by either
(1) party for one year, the court may give notice in writing to the parties to show



cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

- (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
- (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
- (4) The court may dismiss the suit for non-compliance with any direction given under this Order.”

12. Pursuant to the Affidavit sworn by Bruce O Odeny on May 28, 2018, the same was in response to show cause why the suit should not be dismissed and he stated that his law firm had not been served with the cause letter, that the matter was unable to proceed owing to the fact that parties were trying to agree on an out of court settlement and he delay in settlement and further setting this matter down for hearing was hampered as a consequence of the illness of the Defendant’s Advocate Mr. Aboge.

15. It is the Plaintiff’s case that the court did not consider the Affidavit filed by his Advocate explaining that the Defendant’s Advocate ailed for a very long time before succumbing which occasioned delay to fix the matter for hearing. That the Defendants on their part did not change their advocate hence occasioning a challenge on the Plaintiff’s Advocate to fix the matter for hearing in the absence of his counterpart.

16. The 3rd Defendant on the other hand has opposed the Application by stating that the Affidavit sworn by the Plaintiff’s Advocate in response to the notice to show cause is presumptuous as there is nothing to show that the late Aloys Aboge or his firm was served with a mention or hearing notice but declined to proceed on account of his illness. The 3rd Defendant also stated that Mr Aboge began ailing in 2018 and his firm was active since he had an associate who used to manage the firm and attend court.

17. In the case of *Kenya National Private Service Workers Union v Security Guards Services Limited* [2019] eKLR the court had this to say;

“It is trite that, the court exists to do justice to all the parties and it has unfettered discretion to set aside its judgments upon terms. In *Shah v Mbogo and another* [1966] EA 166, Harris J set out the guiding principle on a Judge’s discretion in setting aside a judgment, thus:

“I have carefully considered the principles governing the exercise of the courts’ discretion to set aside a judgment obtained ex parte. This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertent or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.”

18. I have considered the evidence on record and I am convinced that since Counsel for the Defendant passed on, the Plaintiff’s Advocate had challenges in fixing the matter for hearing. I have also read the Affidavit of the Plaintiff’s Advocate and I have established that he has given sufficient reasons to warrant reinstatement of the suit.

19. This court therefore allows the Application and directs as follows:

1. That the orders issued on May 30, 2018 are hereby set aside and this suit is hereby reinstated.
2. That the matter be fixed for hearing at the registry on priority basis.
3. That the costs of this Application be in the cause.



DATED, SIGNED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER 2022.

A. O OMBWAYO

JUDGE

